No. 14714

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

AHTANUM IRRIGATION DISTRICT, A CORPORATION, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF FOR THE UNITED STATES OF AMERICA, APPELLANT

SUBJECT INDEX

378236—56——1

CITATIONS

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The United States of America replies to the response of Appellees and emphasizes their failure to support the judgment of dismissal entered by the court below.

FOREWORD

After a full trial on the merits the trial court entered a judgment of dismissal, declaring:

> the above entitled [1] action and the [2] complaint * * * is hereby dismissed on its merits.[1]

From that judgment of dismissal the United States of America prosecutes this appeal, formulates its specifications of error, tenders both its opening and this reply brief. Yet Appellees [a] fail to support—indeed fail to mention—the dismissal of the com-

[1] R. 166 and 167.

plaint; [b] ignore entirely the proof which they stipulated into the record of the claims of the United States of America, all as set forth in Appendices A and B of the opening brief; [c] do not distinguish between rights to the use of water title to which the United States of America seeks to quiet, and the corpus of the water of the stream in question, a fatal error made by the trial court.

In the paragraphs which succeed Appellees' failure to support the judgment of dismissal entered by the court below will be reviewed.

I. Plain and Serious Error Was Committed by the Court Below When It Dismissed the Complaint in This Cause

No effort is made by Appellees to support the judgment of dismissal by the court below. Under the circumstances they had no alternative for the complaint filed by the United States of America set forth each and every averment requisite to state a claim for the relief for which it prays.[2] Washington's Supreme Court has declared:[3] "The complainant * * * alleged ownership * * * of the first right to divert water. * * * it challenged the defendants to set up any claims they had against such rights. In actions to quiet title to real estate, where such general allegations of ownership are made, it is undoubtedly the duty of a defendant to set up any claim he may

[2] *Ely* v. *New Mexico & Arizona R. R. Co.*, 129 U. S. 291, 293 (1889).

[3] *Spring Hill Irr. Co.* v. *Lake Irr. Co.*, 42 Wash. 379, 382, 85 Pac. 6, 7 (1906).

have of either a legal or equitable nature, * * *."[4] This Honorable Court is respectfully petitioned to examine the complaint[5] filed by the United States of America in the light of the cited authorities. There the sufficiency of the complaint will be revealed and the reversible error by the court below in dismissing it is emphasized.

II. Dismissal of This Action Violates Rule 15 (b) of the Federal Rules of Civil Procedure by Reason of (A) the Comprehensive Pre-Trial Order Entered by the Court Below; (B) the Full Proof of the Claims of the United States of America Based on Evidence Introduced Without Objection

There was formulated by the parties; entered by the trial court a comprehensive Pre-trial Order—likewise ignored by Appellees.[6] Stipulated there are the "Agreed Facts";[7] Contentions of the Parties;[8] Questions of Law.[9] Likewise stipulated into the record were the exhibits of the United States of America, including Appendices A and B of its opening brief.[10] On that background this Honorable Court is respectfully referred to the opening brief of the United States of America,[11] in which the evidence introduced

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[4] Please refer to Brief for the Appellant, United States of America, page 28 et seq.

[5] R. 3 et seq.

[6] R. 123 et seq.

[7] R. 123 et seq.

[8] R. 129 et seq. Pre-trial Statement by Brown and Olson, R. 100.

[9] R. 143 et seq.

[10] R. 99.

[11] Brief for the Appellant, United States of America, page 3 et seq.

without objection is summarized, and petitioned to consider this question:

> On what grounds in the light of the evidence introduced by the United States can the dismissal by the lower court be justified?

A summary of that evidence, set forth in the opening brief of the United States of America,[12] discloses every element requisite for the entry of a decree. Particular reference is made to that phase of the analysis of Appendices A and B of that brief which reveals in great detail the irrigated and irrigable acreages for which the rights to the use of water are claimed.[13]

Alluding to the inquiry above set forth the response is respectfully suggested—It is entirely without justification. Supporting that response are the authorities which are now reviewed.

It has been authoritatively declared: "* * * the parties may, by express consent, or by the introduction of evidence without objection, amend the pleadings at will."[14] "* * * Express consent may be found in a stipulation or pretrial order. Implied consent usually is found where one party raises an issue material to the other party's case, or where evidence is introduced without objection. * * * It should be noted that Rule 15 (b) is not permissive in terms:

> it provides that issues tried by express or implied consent shall be treated as if raised by

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[12] Brief for the Appellant, United States of America, page 21.
[13] Brief for the Appellant, United States of America, page 23.
[14] 3 Moore's Federal Practice, 846.

> the pleadings. The court **must** make findings on such issues, * * *."[15] [Emphasis supplied.]

This succinct statement fully supported by the abundance of authority reveals the error in dismissing the complaint and action:

> * * * Issues not raised by the pleadings which are tried by the express or implied consent of the parties, are treated in all respects as if raised in the original pleadings. A party impliedly consents to the introduction of issues not raised in the pleadings by failure to object to the admission of evidence relating thereto * * *.[16]

It thus is respectfully concluded: If the complaint was not sufficient, which is denied, any deficiency in it was cured by the Pre-trial Order and the proof which was introduced without objection. Any doubt respecting the error of dismissal by the trial court will be dispelled by the admissions of Appellees which are now considered.

III. Admissions by Appellees Disclose Reversible Error by Court Below When it Entered Judgment of Dismissal

Appellees admit that the United States of America is "entitled" to "25% of the flow" of Ahtanum Creek.[17] Yet the court below dismissed the complaint and cause, refusing to adjudicate to it any rights in

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[15] 3 Moore's Federal Practice, 847, 848; Please refer to 6 Cyc. Fed. Proc., 3d ed., Sec. 18.34.

[16] Barron and Holtzoff, Federal Practice and Procedure, pp. 917–918.

[17] Brief of Appellees, page 37.

the stream. However, before proceeding, let this fact be respectfully emphasized—Appellee's admission is based upon the alleged agreement of 1908. The United States of America asserts that alleged agreement is null and void and of no force and effect.

Having admitted that the United States of America is entitled to water from the stream, Appellees refute entirely the judgment of dismissal for they admit that the United States of America, based on the evidence adduced at the trial on the merits, is entitled to a decree—not to have its complaint and action dismissed. Reversible error respecting the judgment of dismissal is thus patent for:

> **If a party is entitled to any relief under the facts as established by the pleadings or proof, the claim will not be dismissed** simply because complainant has erred as to legal theory and is not entitled to the relief prayed for.[18]

This equally authoritative statement in the light of Appellees' admissions further reveals the grave error committed by the court below in dismissing the cause: "If a party has proven a claim for relief, the court will grant him that relief to which he is entitled on the evidence regardless of the designation of the claim or the prayer for relief." [19]

By their admission that the trial court erred when it entered its judgment of dismissal and should have granted relief to "25%" of the "flow" of Ahtanum Creek, Appellees present for determination the ques-

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[18] 6 Moore's Federal Practice, 1208.

[19] Barron & Holtzoff, Federal Practice and Procedure, page 19.

tion of the validity of the alleged agreement upon which they predicate their admission.

IV. Void and of No Force and Effect Is the Only Proper Reference to the Alleged Agreement of 1908 Which purported to Give Away Federal Property to Settle the Private Litigation of *Munn* v. *Redman*

"* * * the case of *Munn* v. *Redman, et al.,* begun * * * in the year 1906," was concluded by "* * * a compromise agreement of 1908," [20] is the statement made in the trial of the case by John H. Lynch, one of the counsel representing the defendants, there. Thus the alleged agreement of 1908 purported to settle the case of Munn v. Redman,[21]—an action not against the United States of America but a subordinate official in the Department of the Interior. Appellees recognize that fact.[22] Wholly aside from the other objections to the validity of that alleged agreement this fact stands out clearly:

> Invaluable rights to the use of water could not be given away by the Secretary of the Interior to settle an action against one of his subordinates. The United States Attorney's participation in the matter (he did not sign the alleged agreement) arose from the fact that an official was being sued, not because the action was against the Federal Government.[23]

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[20] United States of America, Plaintiff's Exhibit No. 11–75; R. 547 et seq.; Testimony of John H. Lynch.

[21] Brief for the Appellant, United States of America, page 9 et seq.

[22] Brief of Appellees, pages 5, 6, 7, 8, and 9.

[23] *United States* v. *Dollar*, 196 F. 2d 551, 554 (C. A. 9, 1952).

That conclusion stems from the principle of law that a judgment in a case against an official of the United States in actions of the nature of *Munn* v. *Redman* are

> not res judicata against the United States.[24]

Based on numerous authorities this statement is set forth in the opening brief of the United States of America: "Few principles of law are more basic than that the Attorney General of the United States is the only one empowered to represent the United States in litigation and to compromise suits of the character here involved."[25] Noteworthy, moreover, is the fact that the Attorney General himself,—assuming he had participated in *Munn* v. *Redman*—could not have given away property of the United States of America to settle a claim against an individual. No official of the United States of America is thus empowered, absent express Congressional authority.[26]

Too great emphasis may not be placed upon this fact: No authorities are cited by Appellees—there is none—which will support the proposition that invaluable rights to the use of water of the United States of America may be given away for the purpose of settling private litigation of the character of *Munn* v. *Redman*. Accordingly, the alleged agree-

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[24] *Land* v. *Dollar*, 330 U. S. 731, 736 (1946). Please refer to *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 686 et seq. (1948).

[25] Brief for the Appellant, United States of America, page 43.

[26] *Utah Power and Light Co.* v. *United States*, 243 U. S. 389, 408 (1916).

ment, it is respectfully submitted, is null and void and of no force and effect.

V. Recitation by Appellees of Duties and Responsibilities of Department of the Interior to Protect Properties of Indians Strikes Down Rather Than Supports Alleged Agreement of 1908

> * * * not the exercise of guardianship or management, **but confiscation**

is the apt description by our Highest Court in regard to contentions there advanced which are strikingly similar to those of these Appellees.[27] Thus there is no basis for the assertion that the power to manage is synonymous with the power to deprive the Indians of their properties by the alleged agreement of 1908.[28] Appellees cite no authority whatever to support the attempted and wholly unauthorized relinquishment of the invaluable property of the Yakima Indians which the United States of America seeks here to protect.[29] A cursory review—a searching analysis of them will not disclose a scintilla of authority pursuant to which the Secretary of the Interior or any of his subordinates could grant to the users of Ahtanum Creek, as was attempted, 75% of the flow of the stream. That conclusion is, of course, buttressed many times over when consideration is given to the fact that those officials of the Department of the Interior, who nego-

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[27] *United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111, 116 (1937).

[28] Please refer to Brief of Appellees, page 16 et seq.

[29] Please refer to Brief of Appellees, pages 16 and 17. Note: Page 18 of Appellees' Brief sets forth a footnote the source of which is undisclosed.

tiated the alleged agreement, were purporting to settle the case of *Munn* v. *Redman*. On repeated occasions the Supreme Court has declared that officials may not dispose of the property of the United States of America without Congressional authority, which is entirely absent in this case.

VI. Congress Alone Has the Power To Dispose of the Properties of the United States of America—There Being No Authority for the Alleged Agreement of 1908 Purporting To Convey 75% of the Flow of Ahtanum Creek It Is Void

"Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted."[30] From the decisions of the Supreme Court it is clear beyond question that the subordinate officials of the Department of the Interior—indeed the Secretary of that Department—may not grant away the property of the United States of America without Congressional authority. Appellees cite no authority, express or implied, to warrant the claim that the alleged agreement of 1908 could grant away from the Indians 75% of the flow of a stream which constitutes the source of their water supply.

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[39] *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 294 (1940); *Utah Power and Light Co.* v. *United States*, 243 U. S. 389, 409 (1916); *United States* v. *California*, 332 U. S. 19, 27 (1946).

VII. Congress Refused to Approve, Confirm, Ratify Alleged Agreement of 1908—Appellees Make No Reply to That Fact Though It Is Emphasized in Brief of the United States of America

Recognizing the invalidity of the alleged agreement of 1908, Congressional approval of it was sought.[31] Although extensive hearings were held in connection with it, the bill did not pass Congress.

Congress having refused to approve, confirm, ratify, or establish the alleged agreement of 1908, it is respectfully submitted that it is null, void and of no force and effect; that the Appellees acquired no rights under it.

VII. The Equities are Entirely With the United States of America—Laches and Estoppel Have No Application to It—Could Not Lend Validity to the Void Agreement of 1908

There being no authority in the subordinate officials of the Department of the Interior to give away the Indians' rights to the use of water in Ahtanum Creek, Appellees seek to invoke the doctrine of laches and estoppel against the National Government.[32] Mr. Justice Black in these succinct terms reveals their error: "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Govern-

[31] Brief for the Appellant, United States of America, page 11.
[32] Brief of Appellees, page 31.

ment to lose its valuable rights by their acquiescence, laches, or failure to act." [33]

As if directed to Appellees' assertion now being considered, the Highest Court on an earlier occasion declared: "Of this [a similar contention] it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. * * * As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest." [34]

Identically the same just principles apply whether the lands and property of the National Government are involved or those of its Indian wards. In a case very closely akin to this, in which an effort was made to deprive the Indians of invaluable property, our Highest Court declared: "No conduct of theirs [officials of the Department of the Interior] can estop the government from asserting its rights to recover for timber cut beyond the quantity and quality specified in the contract. * * * We are therefore of opinion that the defendants cannot take refuge under the consent or acquiescence of the government agent in the disregard of these contracts." [35]

In the light of that decision this Honorable Court is respectfully petitioned likewise to deny to these

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[33] *United States* v. *California*, 332 U. S. 19, 40 (1946).

[34] *Utah Power and Light Co.* v. *United States*, 243 U. S. 389, 408, 409 (1916).

[35] *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 291 (1901).

Appellees refuge behind the doctrine of laches and estoppel which should only be invoked in the aid of equity and good conscience. An analysis of Appendix C of the opening brief of the United States of America will reveal that the United States of America has acted since 1906 with restraint and understanding seeking at all times to settle amicably this protracted controversy.

It is concluded, based upon the law and equally upon the facts, that Appellees are not in a position to rely upon the equitable doctrines to which they refer.

Finally in that regard Appellees state the United States of America, when representing the Indians, is proceeding "in a proprietary capacity."[36] That statement ignores the fundamental character of our general Government, which, having only delegated powers, may act only in its capacity of a sovereign.[37]

IX. Invalid Agreement of 1908 Purported to Relate to Approximately 1,200 Acres of Indian Lands, 4,000 Acres North of the Stream—Involved in This Litigation Are 5,000 Acres of Indian Lands, 10,000 Acres North of the Stream—Dismissal Ignores That Fact

It is denied that the alleged agreement of 1908 has any validity. Yet if it had, it related to only 1,200 acres of Indian land, 4,000 acres of white land.[38] Claimed rights to the use of water for approximately

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[36] Brief of Appellees, page 31.

[37] *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102 (1941).

[38] Brief for the Appellant, United States of America, page 32 et seq.; see also Brief of Appellees, pages 11, 21.

5,000 acres of Indian land and 10,000 acres north of the stream are here involved.

It is abundantly manifest that assuming that the alleged agreement of 1908 had any validity, it did not pertain to the additional acreage. Equally manifest is the fact that the court below should have entered a decree respecting those rights.[39] Thus the judgment of dismissal for this additional reason is plainly in error and should be reversed.

X. There Has Never Been Compliance With the Alleged Agreement of 1908—Appellees Readily Admit That Fact

Appendix B [40] of the opening brief of the United States of America reveals this undisputed fact:

> There never has been compliance with the alleged agreement of 1908.

Reference in that connection is made to the percentage of diversions contained in that Appendix. There is undisputed and unchallenged proof that historically the United States of America on behalf of the Indians has consistently diverted far in excess of the 25% of the "flow" which the alleged agreement purported to fix as the Indian share of Ahtanum Creek.

This candid statement of Appellees reveals their failure to comply with the alleged agreement of 1908:

> Open canals, old river beds and other water courses were used in 1908 [to divert and distribute water north of Ahtanum Creek] when

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[39] Federal Rules of Civil Procedure, Rule 54 (c).

[40] Brief for the Appellant, United States of America, page 79 et seq.

> the agreement was made. They were used in 1925 when the State adjudication took place.[41]

They are used today. Yet the alleged agreement specifically provides: "* * * wherever water is diverted from the main channel of Ahtanum Creek * * * a substantial headgate shall be installed and maintained * * *."[42] Two things are clear [1] Evidence admitted into the record without objection[43] proves the United States of America has consistently diverted water from Ahtanum Creek far in excess of the 25% limitation contained in the alleged agreement; [2] Appellees admit that they have not in the approximately half century since the alleged agreement was entered into, complied with it. Proof in the record: appellees' admission that there has never been compliance with the alleged agreement of 1908, disclose the error of the assertions by Appellees.[44]

Wholly aside from the illegality of the alleged agreement of 1908 the failure of compliance with it by all concerned underscores the error of the court below in dismissing the cause.

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[41] Brief of Appellees, page 59.

[42] Alleged Agreement of 1908, R. 29, Article 5.

[43] Appendix B, page 79, Brief for the Appellant, United States of America.

[44] Brief of Appellees, page 26.

XI. Fatal and Reversible Error of Court Below and Appellees Is Failure To Distinguish Between Rights to the Use of Water and the Flow of Ahtanum Creek; Possession of Rights Is Not Condition To Bring Suit To Quiet Title

Involved here are rights to the use of water, an interest in real property: Not the "flow" or "corpus" of the waters of Ahtanum Creek

This is a quiet title action.[45] Involved are rights to the use of water which are interests in real property.[46] Washington's Supreme Court has declared: "* * * water rights for use upon the land are considered appurtenant to the land and, therefore, realty, is declared by our statutes and prior decisions of this court."[47] This authoritative statement on the basic proposition emphasizes the error of the court below in dismissing the United States of America: The error which pervades the brief of Appellees "* * * a water right [that which is here involved], then is a property right, independent in itself * * * Before diversion the appropriator acquires no title to the *corpus,* or 'the very body of the water,' while it is still flowing naturally in the stream. * * * No title to the *corpus* of the water itself * * * could be granted."[48] Adopting the error of the court below Appellees repeat that there has been a failure "to establish possession" of the waters.[49] Simply stated, short of placing the corpus of the water in a container, ditch

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[45] Brief for the Appellant, United States of America, page 50 et seq.

[46] Brief of Appellant, United States of America, page 51.

[47] Brief for the Appellant, United States of America, page 46 and cases cited.

[48] 2 Kinney on Irrigation and Water Rights, 2d ed., pages 1337–1338.

[49] Brief of Appellees, page 57.

or reservoir, it is not subject to "possession." That is not the issue, rather the issue here is the title to the right to divert and to apply the waters of Ahtanum Creek to a beneficial use. Based on the record the United States of America respectfully submits that it is entitled to a decree quieting its title, on behalf of the Yakima Indians, to the rights claimed by it in Ahtanum Creek.

"Possession" is not a condition precedent to quieting title to rights to the use of water

This statement by Washington's Highest Court brings to focus the grave—it is respectfully submitted, reversible—error of the court below and of Appellees: "* * * we conclude that we are not here dealing with water as personal property * * * but rather with an alleged water right as real property and the [quiet title] action was maintainable by the parties." [50] That same Court reveals the error before this Court by declaring that: "the statute provides * * * that any person, having a valid, subsisting interest in real property and a right to the possession thereof, may recover the same by action, and may have judgment in such action quieting plaintiff's title. Under this section a person holding the legal title to the real estate with the right of possession may maintain an action to quiet his title." [51] Proof of the rights to the use of water—not possession—was the burden of the United States of America which was

[50] Brief for the Appellant, United States of America, page 46.
[51] Brief for the Appellant, United States of America, page 47.

fully sustained by it through evidence introduced into the record without objection.[52]

XII. Winters Doctrine[53] Is Recognized by Appellees—Every Element of Right Has Been Proved to Bring the Claims of the United States of America Within the Purview of That Doctrine

Reference is again made to the opening brief of the United States of America.[54] With great care there has been proved full title to every parcel of land; the ditches which deliver to the lands the waters which are available to those lands; the irrigated and irrigable acreages—duty of water—every element requisite to the formulation of a decree. With regard to that statement this Honorable Court is again respectfully requested to consider Appendices A and B. What more could be proved? Appellees attempt in some manner to distinguish this case from the *Winters* Case[55] and others which protect the rights to the use of water of the Indians under the circumstances here presented.[56] There they state: "The reasonable needs of the Indians have been more than satisfied." Refuting that unsupported and incorrect statement is explicit proof by unchallenged evidence introduced in the record.[57] Fully support-

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[52] Please refer to Appendices A, B and C of Brief for the Appellant, United States of America, setting out part of record and references to exhibits.

[53] *Winters* v. *United States*, 207 U. S. 564 (1908).

[54] Brief for the Appellant, United States of America, pages 7 et seq.

[55] Please refer to Brief for the Appellant, page 33.

[56] Brief of Appellees, page 44.

[57] Brief for the Appellant, United States of America, page 8.

ing the position of the United States of America is the decision in the *Walker* Case.[58] There this Court specifically recognized the doctrine of implied reservation, declaring: "We hold that there was an implied reservation of water [for the Indians] to the extent reasonably necessary to supply the needs of the Indians. * * * The extent to which the use of the stream might be necessary could only be demonstrated by experience."[59] That statement is precisely in point. Every acre of land has been allotted (of the 5,000 acres approximately 900 have been transferred away by the Indians); the necessity of water proved and in fact agreed to in the Pre-trial Order. Though water was used from Ahtanum Creek as early as 1847 for irrigation, the Indian uses increased steadily as the record discloses.[60] The ditches long used to irrigate the lands were consolidated when the present system was constructed.[61] That construction was undertaken in the summer of 1908 at the same time the invalid agreement of the same year was executed. As the exhibits reveal, the work was diligently prosecuted to completion in the year 1915. Also these facts are proved—they are in the "Agreed Facts" set forth in the Pre-trial Order.

Under the circumstances it is respectfully submitted that judgment for the full relief prayed for by the

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[58] *United States* v. *Walker River Irrigation District, et al.*, 104 F. 2d 334 (C. A. 9, 1939).

[59] *Ibid.*, 104 F. 2d 334, 339, 340 (C. A. 9, 1939).

[60] Brief for the Appellant, United States of America, Appendices A and B.

[61] Please refer to United States of America, Plaintiff's Exhibit 5–b; also Exhibit 5–a.

United States of America should be granted; *a fortiori* the judgment of dismissal should be reversed.

XIII. Miscellaneous Errors Contained in Brief of Appellees

a. Rights in a stream include rights in the tributaries to it

Appellees urge that tributaries outside of the reservation contribute to Ahtanum Creek.[62] A more barren right is difficult to perceive than a right in a main stream which did not inhere in the tributaries. Manifestly if rights in the tributaries could be exercised without recognizing main-stream rights the latter would be valueless.[63] This aphorism discloses the Appellees' error in the matter: "Tributary waters, branches, are inseparable parts of the main stream, and with it are subject to common appropriation and control insofar as reasonably necessary in irrigation as in navigation. The first may not be diverted to the impairment of prior rights in the last. The proprietor of the trunk owns the branches, and safety of the first requires protection of the last."[64]

b. The waters from the Klickitat River are not available for the Indian lands here involved

Reference is made by Appellees to the Klickitat River Project. That transmountain diversion project was investigated but was never approved.[65] Appellees fail to explain why the Yakima Indians should be forced to divert water from another watershed

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[62] Brief of Appellees, page 51.

[63] *Conrad Investment Co.* v. *United States*, 161 Fed. 829 (C. A. 9, 1908).

[64] *Dern* v. *Tanner*, 60 F. 2d 626, 628 (D. C. D. Mont. 1932).

[65] Brief for the Appellant, United States of America, page 34.

when their rights in Ahtanum Creek are adequate if Appellees desist from interfering with them.

c. Sovereign immunity from suit precluded the United States of America from appearing in the State adjudication—Appellees err in declaring the United States of America could appear

Error is expressed by the court below and by Appellees in regard to the State proceedings. The United States of America did not appear in that cause and could not be made a party to it; could not appear by reason of its sovereign immunity from suit.[66]

d. Erroneous statements are made by appellees respecting congressional investigation of 1913

Appellees refer to a Congressional investigation respecting the welfare of the Yakima Tribe of Indians. They refrained from citing the source upon which they rely. Apparently the one to which they allude was held August 30, 1913.[67] This Honorable Court is respectfully requested to consider that document which Appellees state "necessarily includes Ahtanum Creek." There was no effort to resolve the issue here presented and Appellees err in representing that it does.

CONCLUSION

In the light of the numerous errors committed by the court below this Honorable Court is respectfully requested to reverse the judgment of dismissal and to

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[66] Brief for the Appellant, United States of America, page 54; See also *Randolph Land & Livestock Company* v. *United States*, 2 Utah 2d 208, 271 P. 2d 846 (1954).

[67] Senate Document No. 337, 63d Congress, 2d Session.

direct the entry of a judgment in favor of the United States of America.

UNITED STATES OF AMERICA,

s/ J. Lee Rankin

J. LEE RANKIN,
Assistant Attorney General.

DAVID R. WARNER,
Attorney, Department of Justice.

s/ William H Veeder

WILLIAM H. VEEDER,
Attorney, Department of Justice.

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